(2)

Supreme Court, U.S.
FILED
SEP 27 2002
OFFICE OF THE CLERK

No. 01-1878

In the

Supreme Court of the United States

ALICE THOMAS, individually and in her capacity as the Director of the Vocational Rehabilitation Branch of the Department of Labor and Industrial Relations, State of Hawaii; and DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII,

Petitioners,

v.

BRIAN VINSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stanley E. Levin
Counsel of Record
Davis Levin Livingston Grande
Suite 400
851 Fort Street
Honolulu, HI 96813
(808) 524-7500
Attorneys for Respondent

CURRY & TAYLOR • (502) 393-4141 • HTTP://USSCINFO.COM

BEST AVAILABLE COPY

24 pp

QUESTION PRESENTED

Whether the State of Hawai`i waived its Eleventh Amendment immunity from suit for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, when it applied for and accepted federal financial assistance.

PARTIES TO THE PROCEEDINGS

Petitioners, defendants-appellees in the court below, are the State of Hawai`i, the Department of Labor and Industrial Relations of the State of Hawai`i, and Alice Thomas in her official capacity as the Director of the Vocational Rehabilitation Branch of the Department of Labor and Industrial Relations of the State of Hawai`i ("DLIR").

Respondents are Brian Vinson, plaintiff-appellant in the court below, and the United States of America, intervenor in the court below.

Alice Thomas, in her individual capacity, and Intracorp, a Delaware corporation, were also defendants-appellees in the court below, but are not petitioners.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

BRIEF IN OPPOSITION STATEMENT 1

REASONS FOR DENYING THE PETITION 4

I. SECTION 2000D-7 OF TITLE 42 PROVIDES THAT "[A] STATE SHALL NOT BE IMMUNE UNDER THE ELEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FROM SUIT IN FEDERAL COURT FOR A VIOLATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973" AND IS VALID AND BINDING ON PETITIONERS 7

II. PETITIONERS CONTENTION (16-20) THAT THIS COURT HAS CONCLUDED THAT SECTION 2000D-7(A) IS AMBIGUOUS AND DID NOT PUT THEM ON NOTICE THAT THEY COULD BE LIABLE FOR MONEY DAMAGES IS ERRONEOUS 9

III. THERE IS NO MERIT TO PETITIONERS' CONTENTION (PET. 20-23) THAT A CLEAR STATEMENT BY CONGRESS REGARDING THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION IS A PREREQUISITE TO A STATE WAIVING ITS SOVEREIGN IMMUNITY 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

AIRCRAFT & DIESEL EQUIP. CORP. v. HIRSCH, 331 U.S. 752 (1947) 6

ALDEN v. MAINE, 527 U.S. 706 (1999) 8, 15

ALEXANDER v. SANDOVAL, 532 U.S. 275 (2001) 10, 11

ARKANSAS DEPT. OF EDUC. v. JIM C., 533 U.S. 949 (2001) ... 5, 11

ATASCADERO STATE HOSP. v. SCANLON, 473 U.S. 234 (1985) 2, 7, 9

BANKERS LIFE & CAS. CO. v. CRENSHAW, 486 U.S. 71 (1988) 6

BARNES v. GORMAN, 122 S. CT. 2097 (2002) ..... *passim*

BELL v. NEW JERSEY, 461 U.S. 773 (1983) 9

BOARD OF EDUC. v. KELLY E., 207 F.3D 931 (7TH CIR. 2000), CERT. DENIED, 531 U.S. 821 (2000) 12

BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA v. GARRETT, 531 U.S. 356 (2001) 3, 5

BURNS-VIDLAK v. CHANDLER, 980 F. SUPP. 1144 (D. HAW. 1997) 10

CANNON v. UNIV. OF CHICAGO, 441 U.S. 677 (1979) 10, 14, 15

CHERRY v. UNIV. OF WIS. SYS. BD. OF REGENTS, 265 F.3D 541 (7TH CIR. 2001) 11

CLARK v. CALIFORNIA, 123 F.3D 1267 (9TH CIR. 1997) 12

COLLEGE SAVINGS BANK v. FLORIDA PREPAID POST SECONDARY EDUC. EXPENSE BD., 527 U.S. 666 (1999) 16

COURT OF COMMON PLEAS OF OHIO v POPOVICH, NO. 01-503 (U.S. APR. 8, 2002) 5

DOUGLAS v. CALIFORNIA DEPT OF YOUTH AUTH., 271 F.3D 812, 820, OPINION AMENDED, 271 F.3D 910 (9TH CIR. 2001), CERT. DENIED ON OTHER GROUNDS, 122 S. CT. 2591 (2002) 4, 5, 11

ELLIS V. DIXON, 349 U.S. 458 (1955) 6

FERGUSON V. CITY OF PHOENIX, 157 F.3D 668 (9TH CIR. 1998) 10

FRANKLIN V. GWINNETT COUNTY PUB. SCH., 503 U.S. 60 (1992) 10, 13

FW/PBS, INC. V. CITY OF DALLAS, 493 U.S. 215 (1990) 6

GARCIA V. S.U.N.Y. HEALTH SCIS. CTR. OF BROOKLYN, 280 F.3D 98 (2ND CIR. 2001) 6, 12

GEBSER V. LAGO VISTA INDEP. SCH. DIST., 524 U.S. 274 (1998) 15

GEORGE MASON UNIVERSITY V. LITMAN, 186 F.3D 544 (4TH CIR. 1999), CERT. DENIED, 528 U.S. 1181 (2000) 5, 11

GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC. V. ZOLIN, 812 F.2D 1103 (9TH CIR. 1987) 11

GROVE CITY COLLEGE V. BELL, 465 U.S. 555 (1984) 8

GUARDIANS ASS'N V. CIVIL SERV. COMM'N OF CITY OF NEW YORK, 463 U.S. 582 (1983) 15

IN RE INNES, 184 F.3D 1275 (10TH CIR. 1999)(DICTUM), CERT. DENIED, 529 U.S. 1037 (2000) 12

INTERNATIONAL BHD. OF TEAMSTERS V. DENVER MILK PRODUCERS, INC., 334 U.S. 809 (1948) 6

JIM C. V. U.S., 235 F.3D 1079 (8TH CIR. 2000)(EN BANC) 5, 11

KANSAS V. U.S., 531 U.S. 1035 (2000) 11

KANSAS V. UNITED STATES, 214 F.3D 1196 (10TH CIR. 2000)("IN THIS CONTEXT, A DIFFICULT CHOICE REMAINS A CHOICE, AND A TEMPTING OFFER IS STILL BUT AN OFFER"), CERT. DENIED, 121 S. CT. 623 (2000) 8

KOSLOW V. PENNSYLVANIA, __F3D __, 2002 WL 1925569 (3RD CIR. 2002) 11

LANE V. PENA, 518 U.S. 187 (1996) 9, 10

LAPIDES V. BD. OF REGENTS OF UNIV. SYS. OF GA., 122 S. CT. 1640 (2002) 9

LOVELL V. CHANDLER, __ F.3D __, 2002 WL 2022140, *7-8 (9TH CIR. 2002) 11

MORENO V. CONSOLIDATED RAIL CORP., 99 F.3D 782 (6TH CIR. 1996)(EN BANC) 1

NEW YORK V. U.S., 505 U.S. 144 (1992) 9, 14

NIHISER V. OHIO ENVTL. PROT. AGENCY, 269 F.3D 626 (6TH CIR. 2001), CERT. DENIED, 122 S. CT. 2588 (2002) 5

OKLAHOMA TAX COMM'N. V. CHICKASAW NATION, 515 U.S. 450 (1995) 6

OLMSTEAD V. L.C., 527 U.S. 581 (1999) 1, 16

PEDERSON V. LOUISIANA STATE UNIV., 213 F.3D 858 (5TH CIR. 2000) 11

PETTY V. TENNESSEE-MISSOURI BRIDGE COMMISSION, 359 U.S. 275 (1959) 16

RESCUE ARMY V. MUN. COURT OF LOS ANGELES, 331 U.S. 549 (1947) 6

ROBINSON V. KANSAS, 295 F.3D 1183 (10TH CIR. 2002) 11

SANDOVAL V. HAGAN, 197 F.3D 484 (11TH CIR. 1999) 11

SOUTH DAKOTA V. DOLE, 483 U.S. 203 (1987) 14, 16

STANLEY V. LITSCHER, 213 F.3D 340 (7TH CIR. 2000) 11

UNITED STATES V. UNITED FOODS, INC., 533 U.S. 405 (2001) 6

UNITED STATES V. WILLIAMS, 504 U.S. 36 (1992) 6

WILSON V. ARMSTRONG, 524 U.S. 937 (1998) 12

STATUTES

20 U.S.C. §1681 2

28 U.S.C. §1254 1

28 U.S.C. §2403(a) 4

29 U.S.C. §§701 1
29 U.S.C. §794 ..... i, 2
29 U.S.C. §794a(a)(2) 14, 15
29 U.S.C.794 (a)(1994 & Supp. V 1999) 1
42 U.S.C. §6101 2
42 U.S.C. §12201 ..... 1, 7
42 U.S.C. 2000d 2
42 U.S.C. §2000d-7 ..... 1, 2
Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, 42 1
Pub.L.No. 99-506, Tit. X, §1003, 100 Stat. 1845 (1985) 2
Pub.L.No. 95-602, 92 Stat. 2955 14

REGULATIONS

28 C.F.R. Section 35.105 3

OPINIONS BELOW

The opinion of the court of appeals is reported at 288 F.3d 1145 (9th Cir. 2002), and is reprinted in the Petitioners' Appendix ("Pet. App.") at 1a. The opinion of the district court is not reported; it is reprinted at Pet. App. 31a.

JURISDICTION

Judgment of the court of appeals was entered on May 3, 2002. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and relevant provisions of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, and the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845, 42 U.S.C. § 2000d-7, are reprinted in Pet. App. 78a-83a.

BRIEF IN OPPOSITION STATEMENT

1. Section 504 (a) prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794 (a)(1994 & Supp. V 1999). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. *See Olmstead v. L.C.*, 527 U.S. 581, 590 n.4 (1999); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir. 1996)(en banc).

2. In 1985, this Court ruled that Section 504 was not clear enough to show Congress' intent to condition federal funding on a waiver of the Eleventh Amendment immunity for private damage suits against state entities. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-246

(1985). The direct and prompt Congressional response was to enact 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub.L.No. 99-506, Tit. X, §1003, 100 Stat. 1845 (1985). Section 2000d-7 provides in pertinent part that:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

3. Respondent Brian Vinson was a fully employed workman for a flooring contractor. In 1993, while installing flooring, he severely injured his neck and back. He received worker's compensation benefits, including vocational rehabilitation benefits, paid for by his employer's worker's compensation carrier, which in turn contracted with a private company to develop and manage his vocational rehabilitation plan. The rehabilitation plan had to be approved by the Petitioner DILR, through its administrator, Petitioner Alice Thomas. Without ever interviewing Vinson, or reviewing his actual plan, Ms. Thomas ordered Vinson to carry at least 15 full-time credit hours or suffer termination of his vocational rehabilitation benefits, including attending college. When Vinson informed Ms. Thomas that it was impossible for him to carry such a course load because of his dyslexia, Ms. Thomas ordered Vinson's case closed, because the rehabilitation plan being considered included accommodations for Vinson's dyslexia to permit him to carry less than 15 credits. Ms. Thomas concluded that Vinson had failed to provide sufficient medical information to support

the asserted disability. Therefore, she concluded the plan was "not feasible." Pet. App. 3a-8a.

4. Respondent filed suit in district court, alleging that petitioners' conduct violated Title II of the ADA and Section 504 of the Rehabilitation Act. He alleged that Thomas and the DLIR discriminated against him by denying his request for vocational rehabilitation schooling benefits without making reasonable accommodations for his dyslexia. He sought reinstatement of his vocational rehabilitation benefits, monetary damages and injunctive relief ordering and directing the petitioners to comply with the self-evaluation and transition plan requirements of the Section 504 regulations. After Vinson filed his lawsuit, the district court granted injunctive relief which resulted in the DLIR reopening his case and his being granted vocational rehabilitation benefits, including schooling, at his requested pace of study. Over the next two years, pursuant to the requirements of the injunction, the petitioners undertook the self-evaluation (and prepared the necessary transition plan) required under 28 C.F.R. Section 35.105. The only remaining claim was Vinson's claim for monetary damages.

The petitioners filed for summary judgment on liability, which the district court granted, but the petitioners did not raise the defense of Eleventh Amendment immunity from claims arising under Title II ("abrogation of immunity"), or Section 504 ("waiver of immunity"), in this motion. Therefore, the district court did not address the Eleventh Amendment. Pet. App. 31a-75a.

Respondent Vinson appealed the district court decision on three grounds, none of which involved the sovereign immunity issues raised by petitioners in this Court. *See* Plaintiff-Appellant Brian Vinson's Opening Brief, filed July 26, 2000 at 1-2. After opening and answering briefs had been filed, the court of appeals ordered the parties to file supplemental briefs discussing the effect of this Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). *See* filed Order dated April 19, 2001. In its supplemental brief, petitioners argued that Vinson's "...Section 504 claims also fail to defeat the State's

Eleventh Amendment immunity because Section 504 does not represent a valid exercise of Congress' spending clause powers." *See* Defendant-Appellee Alice Thomas, et al.'s supplemental letter brief filed April 26, 2001, at 2. Respondent urged the contrary. *See* Plaintiff-Appellant Brian Vinson's supplemental letter brief filed April 26, 2001. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend, *inter alia*, the constitutionality of the provisions of law conditioning the states' receipt of federal funding on the waiver of Eleventh Amendment immunity. In reply, the sole issue addressed by petitioners was "whether the intended abrogations [under Title II and Section 504] were enacted pursuant to a valid exercise of congressional power under the Enforcement Clause of the Fourteenth Amendment."

5. At oral argument before the court of appeals, petitioners abandoned the position set forth in their supplemental brief to the court of appeals [*compare* Defendant-Appellees Alice Thomas, et al.'s Replacement Answering Brief filed September 25, 2000 *with* Brief for Defendants-Appellees in Response to Brief of Intervenor United States at p. 21 ("Section 504 is not Spending Clause legislation at all. It is Fourteenth Amendment legislation, and invalid at that.")]. During oral argument in the Court of Appeals, respondent waived any separate claim against the petitioners under Title II of the ADA. Pet. App. 2a n.1. No Title II claim remains in this case.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision of the court of appeals stated that the state's arguments on the sovereign immunity issue were foreclosed by the court's decision in *Douglas v. California Dept of Youth Auth.*, 271 F.3d 812, 820, *opinion amended*, 271 F.3d 910 (9th Cir. 2001).[1] A petition for a writ of

[1] The court stated: "Consistent with our recent decision in *Douglas v. California Department of Youth Authority*, 271 F.3d 812, as amended, 271

certiorari was filed in *Douglas*, and was denied by this Court on other grounds. 122 S. Ct. 2591 (2002). This Court has denied a petition for a writ of certiorari in a number of other cases presenting virtually identical Eleventh Amendment issues, including *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 2588 (2002); *Jim C. v. U.S.*, 235 F.3d 1079 (8th Cir. 2000)(en banc), *cert. denied sub nom. Arkansas Dept. of Educ. v. Jim C.*, 533 U.S. 949 (2001); and *George Mason University v. Litman*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000).

In the court of appeals, petitioners' argument was that Section 504 was not Spending Legislation, but rather was an improper exercise of Congress's authority under Section 5 of the Fourteenth Amendment. This argument is, however, foreclosed by this Court's decision in *Barnes v. Gorman*, 122 S. Ct. 2097, 2103 n.3 (2002)(stating that the Rehabilitation Act is Spending Act legislation). Effectively acknowledging that their prior argument was without merit, petitioners raise new arguments in their petition that were not presented to, nor addressed by, the court of appeals. In particular, the petition in this case would require this Court to address whether Title II of the ADA's abrogation of sovereign immunity is constitutional, even though there is no longer a Title II claim in this case and the court of appeals did not consider this question. *See* Pet. at 2, *citing Court of Common Pleas of Ohio v. Popovich*, No. 01-1503 (U.S. Apr. 8, 2002) (a case with no Section 504 claim in which the petitioner seeks to resolve

---

F.3d 910 (9th Cir. 2001), we hold that by its acceptance of federal Rehabilitation Act funds, the State waived its Eleventh Amendment immunity as to Vinson's claim under section 504 of the Rehabilitation Act." Pet. App. 2a. It also stated: "We first address the DLIR's contention that it is protected from suit on Vinson's Rehabilitation Act claim by sovereign immunity under the Eleventh Amendment. This argument is foreclosed by our recent decision in *Douglas*. In that case, we reaffirmed, following the Supreme Court's decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), our previous holding in *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), that States are subject to suit in federal court under section 504 of the Rehabilitation Act if they accept federal Rehabilitation funds. The state of Hawai'i accepted federal Rehabilitations funds. Therefore, the Eleventh Amendment is not a bar to Vinson's Section 504 claim against the DLIR. *See Douglas*, 271 F.3d at 820-21. We now turn to the merits of that claim." Pet. App. 9a.

whether Congress, in Title II of the Disabilities Act, has validly abrogated the state court's Eleventh Amendment immunity from suit); and *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98 (2nd Cir. 2001)(holding that Title II was a valid abrogation of Eleventh Amendment immunity in cases alleging a Title II violation motivated by discriminatory animus, or ill will, based on the plaintiff's disability, and that Section 504 waivers of immunity could not be voluntary in light of Title II's abrogation).

The petitioners' position is that the abrogation of immunity under Title II gave it no meaningful choice as to waiver of immunity under Section 504. Pet. at 4-6; 11-16. This Court does not ordinarily grant review to consider questions that were neither pressed, nor passed upon, below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *see also United States v. Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 217 (1990). This is a court of "review, not one of first view," *Oklahoma Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 457 (1995), and the failure of the petitioners to raise these arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988). Where the appellate record is inadequate and does not factually frame the constitutional principles involved, *certiorari* should be denied. *See International Bhd. of Teamsters v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948); *Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 575-585 (1947); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 762-763 (1947). *See also Ellis v. Dixon*, 349 U.S. 458 (1955). These principles are particularly compelling in a case like this because this Court could not even reach the Section 504 question raised by the petitioners without first addressing and resolving abrogation of immunity issues under Title II of the ADA, even though there is no Title II claim in this case.

I. SECTION 2000D-7 OF TITLE 42 PROVIDES THAT "[A] STATE SHALL NOT BE IMMUNE UNDER THE ELEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FROM SUIT IN FEDERAL COURT FOR A VIOLATION OF SECTION 504 OF THE REHABILITATION ACT OF 1973" AND IS VALID AND BINDING ON PETITIONERS.

Petitioners contend (Pet. 11–16) that this provision, passed in 1986, is not effective because Congress, several years later, abrogated the states' immunity from suits for discrimination under Title II so that Hawai`i "lacked any meaningful choice of retaining its immunity." Pet. at. 13. In addition to the fact that this argument was not briefed in, or addressed by, the court of appeals, petitioners' argument is without merit because every state agency did know from the plain text of Section 2000d-7, from the time it was enacted, that acceptance of federal funds constituted a waiver of immunity from suit for violation of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990 (which was not effective until 1992), and it was clear that plaintiffs could sue under either statute. *See* 42 U.S.C. 12201 (b) (preserving existing causes of action).[2] It is, thus, untenable to suggest that abrogation of immunity for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute.

Petitioners suggest that the state had no meaningful alternative to waiving its immunity under Section 504

---

[2] The contention that Title II made the state's Section 504 waiver redundant was recently rejected by the Third Circuit Court of Appeals in *Koslow v. Pennsylvania*, __F3d __, 2002 WL 1925569 n 12 (3rd Cir. 2002). The court noted that "the ADA was not enacted to alter existing causes of action. See 42 U.S.C.§ 12201(b)(retaining existing causes of action). Therefore, the "clear intent to condition participation in the programs funded" required by *Atascadero*, 473 U.S. at 247, ensured the Commonwealth of Pennsylvania knew that by accepting certain federal funds under the Rehabilitation Act for certain departments or agencies, it waived immunity from suit on Rehabilitation Act claims for those entities".

because of the existence of the ADA. However, petitioners ignore the period from 1986-1992, when only Section 2000d-7's statutory waiver was effective. Indeed, there is no evidence in the record suggesting the State of Hawai`i refused federal funds between the effective date of Section 2000d-7 and the effective date of Title II, a period during which it clearly could not have been influenced by the abrogation provisions in the ADA. There is also no evidence in the record that the state changed its conduct during the 1986-1992 period, or at any other time between 1986-2002.

Petitioners have not identified anything about Title II or Section 504 that deprived the state of its ability to say "no" to the offer of Section 504 federal funds for any agency it does not want to be subjected to the non-discrimination requirements of Section 504. While it may not be easy to decline federal funding – and while theoretically the existence of Title II may have made the choice harder, petitioners still have not shown the state was deprived of that choice in the constitutional sense[3]. *See Grove City College v. Bell*, 465 U.S. 555, 575 (1984); *Kansas v. United States*, 214 F.3d 1196, 1203, 1204 (10th Cir. 2000)("in this context, a difficult choice remains a choice, and a tempting offer is still but an offer"), *cert. denied*, 121 S. Ct. 623 (2000). Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden v. Maine*, 527 U.S. 706, 750 (1999), it is perfectly appropriate to permit each state to make its own cost-benefit analysis for each state

---

[3] The Petitioners are arguing, in effect, that if there is any other law that prohibits the discrimination in which the recipient may want to engage, then it has no choice but to accept the federal funds because even if it does not accept, it cannot discriminate. If the Petitioners are correct, the State's waiver of its immunity with respect to Title IX is also ineffective because the Fourteenth Amendment already prohibits sex discrimination in public education; similarly, its waiver of immunity with respect to Title VI is ineffective because of race discrimination prohibitions in the Fourteenth Amendment, Section 1981, and Title VII. Thus, in areas where multiple laws may use different tools to address the same problem, the petitioners are implicitly urging significant and heretofore unrecognized limits on the federal government's Spending Clause right to place conditions on the receipt of federal funds. Obviously, these limitations could well impact Congress' willingness to provide federal funding to the States in a wide range of vital programs.

agency it has established and determine whether to accept the federal money with the condition that that agency can be sued in federal court, or forgo the federal funds. *See New York v. U.S.*, 505 U.S. 144, 168 (1992). Title II may or may not have been part of petitioner's cost-benefit analysis, implicitly or explicitly. Nonetheless, once the state made its choice, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding *** simply does not intrude on their sovereignty." *Bell v. New Jersey*, 461 U.S. 773, 790 (1983). *See also Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 122 S. Ct. 1640 (2002), where this Court ruled that a state can waive its Eleventh Amendment immunity by removing a case to federal court.

The state cannot show that the enactment of Title II meant that it no longer had a choice on whether to accept Section 504 funds. It still had that choice, and its assent to the waiver was manifested in its voluntary action in accepting the federal funds.

II. PETITIONERS CONTENTION (16-20) THAT THIS COURT HAS CONCLUDED THAT SECTION 2000D-7(A) IS AMBIGUOUS AND DID NOT PUT THEM ON NOTICE THAT THEY COULD BE LIABLE FOR MONEY DAMAGES IS ERRONEOUS.

Petitioners' notice argument is completely foreclosed by the decisions of this Court, as well as by petitioners' own position in this case. First, petitioners argue (Pet. at 17) that *Lane v. Pena*, 518 U.S. 187 (1996), supports their contention that Section 2000d-7(a) is ambiguous, even urging that "[b]ecause *Lane* holds that monetary damages for violation of Section 504 are not available against federal public entities, neither are they available against States." Pet. at 19. Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, this Court held that Congress had not unmistakably expressed its intent to abrogate the states' Eleventh Amendment immunity in the Rehabilitation Act, and that the states, accordingly, were not "subject to suit in

federal court by litigants *seeking retroactive monetary relief under § 504.*" *Atascadero* at 235. (Emphasis added).

In *Lane*, this Court acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. 518 U.S. at 200. This express language in *Lane*, which petitioners do not address, in and of itself disposes of petitioners' ambiguity argument. There is no question that under *Lane* money damages for violations of Section 504 are available against the states and Petitioners' contention (Pet. App. at 19-20) that "Congress has not set forth a clear statement notifying the States that accepting Rehabilitation Act funds waives sovereign immunity with respect to claims for monetary damages" is clearly wrong. Moreover, it must be noted that petitioners' contention that 2000d-7 is ambiguous could not be accepted without this Court's reversal of numerous recent decisions in addition to *Lane*, including *Alexander v. Sandoval*, 532 U.S. 275, 279-280 (2001) (Section 2000d-7 ratifies the holding in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) that private individuals may sue to enforce Section 601 of Title VI and obtain both injunctive relief and damages); *Cannon v. University of Chicago*, 441 U.S. 677 (1979)(a private right of action existed to enforce Title IX of the Education Amendments); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)(Section 2000d-7 "cannot be read except as a validation of *Cannon's* holding.") *Id.* at 72; *see also Id.* at 78 (Scalia, J., concurring in judgment).

Nor did petitioners urge their interpretation of *Lane* before the court of appeals. To the contrary, they admitted that Section 504 remedies included: (1) injunctive relief; (2) compensatory damages, at least for intentional discrimination, citing *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998); (3) punitive damages, *Burns-Vidlak v. Chandler*, 980 F. Supp. 1144, 1147-48 (D. Haw. 1997)(collecting cases)[4]; and (4) attorneys' fees.[5] They cannot

---

[5] Petitioners' Replacement Answering Brief filed September 25, 2000 at 10.

deny notice of these remedies, since the Ninth Circuit held that compensatory damages were available in private Section 504 actions almost fifteen years ago. *See Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1107 (9th Cir. 1987). [6]

Moreover, the courts of appeal are in agreement that the language of Section 2000d-7 clearly put the states on complete notice that by accepting federal financial assistance, states and state entities waive sovereign immunity from suits alleging discrimination under Section 504. *See Lovell v. Chandler*, __ *F.3d* __, *2002 WL 2022140, *7-8 (9th Cir. 2002); Koslow v. Pennsylvania*, __*F3d* __, 2002 WL 1925569 *(3rd Cir. 2002); Robinson v. Kansas*, 295 F.3d 1183, 1190 (10th Cir. 2002); *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820, *opinion amended*, 271 F.3d 910 (9th Cir. 2001), *cert. denied on other grounds*, 122 S. Ct. 2591 (2002)[7]; *Arknasas Dept. of Educ. v. Jim C.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000)(en banc), *cert. denied, sub nom. Jim C. v. Arkansas Dept. of Educ.*, 533 U.S. 949 (2001); *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000)(Title IX); *Sandoval v. Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999)(Title VI), *rev'd on other grounds, sub nom., Alexander v. Sandoval*, 532 U.S. 275 (2001); *Kansas v. U.S.*, 531 U.S. 1035 (2000) (denying petition for *certiorari* by state claiming that Spending Clause statute was unconstitutionally coercive); *George Mason University v. Litman*, 186 F.3d 544, 554 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) (Congress succeeded in its effort to codify a clear, unambiguous and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1));

---

[6] The Ninth Circuit Court of Appeals again rejected the state's claim of sovereign immunity under the Eleventh Amendment from Section 504 damage awards in *Lovell v. Chandler*, __ F.3d __, 2002 WL 2022140, *7-8 (9th Cir., Sept. 5, 2002).

[7] Petitioners cite the dissent in *Douglas* in support of their assertion that there is a split among the circuits. Pet. App. at 2, 7. They have presented no legal authority, however, that dissenting opinions can create the kind of split in authority between circuits that this Court would need to resolve.

Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied, sub nom. Wilson v. Armstrong*, 524 U.S. 937 (1998); *In re Innes*, 184 F.3d 1275, 1282-83 (10th Cir. 1999)(dictum), *cert. denied*, 529 U.S. 1037 (2000); *Board of Educ. v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 2000), *cert. denied*, 531 U.S. 821 (2000) (finding clear waiver of the Eleventh Amendment under the Individuals with Disabilities Act, the court stated states must take the bitter with the sweet; having accepted the money, they must litigate in federal court.).

Petitioners are wrong in asserting that *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 115 at n.5 (2d Cir. 2001), reached a contrary conclusion. Indeed, the *Garcia* court expressly noted that *Jim C.* and *Clark v. California* focused exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state, in fact, received the funds, not on whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity. It agreed with the other courts of appeals that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at 113.[8] Thus, the State of Hawai`i was clearly and repeatedly forewarned – and actually knew – that its decision to accept federal funds subjected it to suit for money damages under Section 504.

The contract-like analysis uniformly applied by the courts of appeal, including the Ninth Circuit in this case, is in accord with this Court's analysis and decision in *Barnes v. Gorman*, 122 S. Ct. 2097 (2002). In *Barnes*, the plaintiff sued

---

[8] *Garcia* stands alone in federal jurisprudence in creating a patchwork of coverage for Section 504, holding that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's when a "colorable basis for a state to suspect" that Congress lacked the power to abrogate Eleventh Amendment immunity in passing Title II of the ADA. *Garcia*, 280 F.3d at 114 n.4. No other circuit court has ruled on this issue one way or another, though the Court of Appeals for the Third Circuit implicitly rejected the *Garcia* holding, noting that the ADA was not enacted to alter existing cause of action. *Koslow, supra* at n 12. Most certainly the court of appeals did not reach this issue in the instant proceeding.

local police officials for violating the ADA and Section 504 by failing to maintain appropriate policies for the transportation of persons with spinal injuries. A jury awarded Mr. Gorman compensatory and punitive damages. The district court vacated this award for punitive damages on the grounds that punitive damages are unavailable in suits brought under the ADA and Section 504.

On appeal, the Eighth Circuit reversed, finding that punitive damages are available under the "general rule" of *Franklin v. Gwinnett County Sch.*, 503 U.S. 60 (1992). This Court reversed the Eighth Circuit and ruled that punitive damages are not available in suits brought under the Title II of the ADA and Section 504. This Court recognized the links between Title II, Section 504 and "the remedies...set forth in Title VI [of the Civil Rights Act of 1964]" and found these remedies to be coextensive with those remedies set forth for private causes of action under Title VI. *Barnes*, 122 S.Ct. at 2100. This Court then acknowledged that Title VI invoked the Spending Clause power under the United States Constitution, Art. I, §8, cl. 1., to place conditions on the grant of federal funds to the states. *Ibid.*

Furthermore, the Court described the relationship between Title VI, the Spending Clause and the funding recipient as "much in the nature of contract: In return for federal funds the [recipients] agree to comply with federally imposed conditions." *Ibid.* The core of the Congress's use of the Spending Power is whether or not Congress has unambiguously imposed a condition and whether the recipient voluntarily and knowingly accepts the terms. *Ibid.* Finding the contract law analogy useful, this Court applied the same analogy to decide that a recipient under Title VI is generally on notice that the recipient is subject "not only to those remedies provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract." *Id.* at 2101. Viewing the imposition of punitive damages as beyond one of reasonable expectation of a Title VI recipient, because it created liability of "indeterminate magnitude," this Court concluded that punitive damages were not reasonably within the contemplation of the parties. Because punitive damages are not available in Title VI cases,

they were, therefore, unavailable under Section 202 of the ADA and Section 504 of the Rehabilitation Act. *Id.* at 2103.

The court of appeals decision in this case foreshadowed this contract-type analysis of this Court and is entirely consistent with it. The Ninth Circuit employed the simple contract approach to the State of Hawai`i's acceptance of federal financial assistance—the state accepted the monies on certain clear conditions, one of them being a waiver of the Eleventh Amendment immunity. The Ninth Circuit, using exactly the *Barnes* analysis and approach, simply reminded the State of Hawai`i of its pre-existing obligation to waive the sovereign immunity provided by the Eleventh Amendment when it applied for and received federal funds. Review of that decision is certainly not warranted, because the Ninth Circuit acted well within this Court's decisions in *New York v. U.S.*, *supra* and *South Dakota v. Dole*, 483 U.S. 203 (1987).

III. THERE IS NO MERIT TO PETITIONERS' CONTENTION (PET. 20-23) THAT A CLEAR STATEMENT BY CONGRESS REGARDING THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION IS A PREREQUISITE TO A STATE WAIVING ITS SOVEREIGN IMMUNITY.

Again, petitioners below did not present this argument, and the court of appeals did not address it. In any event, the contention is without merit. In 1978, after this Court recognized a private right of action to enforce rights under the federal financial statutes,[9] Congress amended the Rehabilitation Act by adding a provision (§ 505) clarifying the procedures and remedies applicable to Section 504. Pub.L.No. 95-602, 92 Stat. 2955. It provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance *** under section 794 of this title." 29 U.S.C. §794a(a)(2).

---

[9] See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-05 (1979).

In enacting Title VI, Title IX, and Section 504 of the Rehabilitation Act, Congress did not expressly provide for a private cause of action. This Court, however, has ruled that implied rights of action exist under Title IX (*Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-05 (1979)); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (Title IX gives a student an implied right of action for sexual harassment by a teacher in such a program, provided the program's officials have "actual notice of, and [have been] deliberately indifferent to, the teacher's misconduct." *Id.* at 274.) and Title VI (*Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983)). *See also Barnes*, 122 S. Ct. at 2101 ("A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract. Thus we have held that under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages and injunction, forms of relief traditionally available in suits for breach of contract." (Citations omitted.))

The provisions of the Rehabilitation Act at issue here are just as precise as those found to constitute a valid waiver of the federal government's immunity in *Lane*: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available *to any person aggrieved by any act or failure to act by any recipient of Federal assistance* *** under section 794 of this title." 29 U.S.C. §794a(a)(2). (Emphasis added). Petitioners have not, and cannot, point to any language in the statute akin to the "executive agency"/"Federal provider"-type language which created the ambiguity in *Lane*.

Furthermore, contrary to petitioners' claims (Pet. at 22), *Pennhurst I*, *Alden* and *College Savings* do not require a more clear statement of waivers of immunity than approved by this Court in *Lane* and as present here. For instance, in *Alden v. Maine*, 527 U.S. 706, 755 (1999), the Court specifically noted "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent

to private suits. Cf. *South Dakota v. Dole*, 483 U.S. 203 * * * (1987)."[10] Similarly, in *College Savings Bank v. Florida Prepaid Post Secondary Educ. Expense Bd.*, 527 U.S. 666 (1999) the Court recognized that an "unequivocal" waiver of a state's sovereign immunity was consititutionally possible, 527 U.S. at 680-81, reaffirming the holding of *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts). *Id.* at 686.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Stanley E. Levin
Counsel of Record ·
Davis Levin Livingston Grande
Suite 400
851 Fort Street
Honolulu, HI 96813
(808) 524-7500
Attorneys for Respondent

---

[10] *Alden* involved a state's immunity from suit in its own courts, and did not involve the receipt of federal funds under the Rehabilitation Act.